



**IT IS ORDERED** as set forth below:

**Date: November 18, 2009**

**W. H. Drake**  
**U.S. Bankruptcy Court Judge**

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
NEWNAN DIVISION**

<b>IN THE MATTER OF:</b>	:	<b>CASE NUMBERS</b>
	:	
ANTHONY B. FREEMAN,	:	BANKRUPTCY CASE
	:	NO. 09-12732-WHD
Debtor.	:	
-----	:	
	:	
HBH ENTERPRISES, INC.,	:	
H. HERBERT LOVE, CHARLENE	:	
LOVE,	:	
	:	
Plaintiffs,	:	ADVERSARY PROCEEDING
	:	NO. 09-1077
v.	:	
	:	
ANTHONY B. FREEMAN,	:	IN PROCEEDINGS UNDER
	:	CHAPTER 11 OF THE
Defendant.	:	BANKRUPTCY CODE

**ORDER**

Before the Court is the Motion to Dismiss Complaint of HBH Enterprises, Inc.,

H. Herbert Love, and Charlene Love (hereinafter collectively the “Plaintiffs”), filed by Anthony B. Freeman (hereinafter the "Defendant"). This matter constitutes a core proceeding, over which this Court has subject matter jurisdiction. *See* 28 U.S.C. § 157(b)(2)(I).

### **FACTS**

In 2003, the Plaintiffs sold to the Defendant an automobile repair business, and the Defendant personally guaranteed certain promissory notes in favor of the Plaintiffs. The Defendant was to begin making payments on one of the notes in April 2007, and payments on the other note would have come due in April 2022. The Defendant made no payments to the Plaintiffs on the first note. It appears that these debts are unsecured.

The Defendant filed a voluntary petition under Chapter 11 of the Bankruptcy Code on August 3, 2009. To date, no plan of reorganization has been filed. On August 19, 2009, the Plaintiffs filed the instant complaint, and a summons was issued upon the Defendant. There is no proof of service to indicate that the complaint was properly served upon the Defendant. In their complaint, the Plaintiffs seek "reinstatement" of the promissory notes, which this Court construes to be a request that the debts represented by these notes not be discharged.

## CONCLUSIONS OF LAW

The Defendant seeks dismissal of the entire complaint on two bases: 1) lack of service of process; and 2) failure to state a claim. The Defendant further seeks dismissal of HBH Enterprises, Inc. from this matter on the basis that the complaint was not prepared and filed by a licensed attorney. While the former is an additional basis for dismissal of HBH Enterprises, Inc. as a plaintiff, *see Palazzo v. Gulf Oil Corp.*, 764 F.2d 1381 (11<sup>th</sup> Cir. 1985), the Court finds that the entire complaint should be dismissed on the alternative two grounds raised by the Defendant.

As to the lack of service of process, the Defendant asserts that the complaint and summons were served only upon the Defendant's attorney. Rule 7004(b)(9) of the Federal Rules of Bankruptcy Procedure provides that service on the debtor is accomplished "by mailing a copy of the summons and complaint to the debtor at the address shown in the petition or statement of affairs or to such other address as the debtor may designate in a filed writing." FED. R. BANKR. P. 7004(b)(9). Perfection of service of process results in this Court's obtaining jurisdiction over parties such that it can adjudicate their rights. *Combs v. Nick Garin Trucking*, 825 F.2d 437, 442 (D.C. Cir. 1987) (citation omitted); *Fed. Trade Comm'n v. Compagnie De Saint-Gobain-Pont-A-Mousson*, 636 F.2d 1300, 1319 (D.C. Cir. 1980). Rule 7004(e) calls for service of the summons and complaint within ten days of issuance of the

summons. FED. R. BANKR. P. 7004(e).

While the Plaintiffs mailed the complaint to the Defendant's attorney, there is no evidence that the Plaintiffs served the summons within the requisite ten-day period upon the Defendant at the address shown in the petition. It is within the Court's discretion, however, to grant the Plaintiffs an opportunity to effectuate service of process. *Umbenhauer v. Woog*, 969 F.2d 25, 30 (3d Cir. 1992) (“[D]ismissal of a complaint is inappropriate when there exists a reasonable prospect that service may yet be obtained. In such instances, the district court should, at most, quash service, leaving the plaintiffs free to effect proper service.”) (citations omitted); *Montalbano v. Easco Hand Tools, Inc.*, 766 F.2d 737, 740 (2d Cir. 1985) (same) (citations omitted); *Stanga v. McCormick Shipping Corp.*, 268 F.2d 544, 554-55 (5th Cir. 1959) (concluding that the district court should not have dismissed case simply due to plaintiffs' one-failed attempt at service) (Brown, J., dissenting in part).

While the Court would ordinarily grant additional time to perfect service of process, the Court finds that doing so in this case would be futile, as the complaint also fails to state a claim upon which relief can be granted and should be dismissed on that basis. Pursuant to Federal Rule of Bankruptcy Procedure 7012(b), which makes Federal Rule of Civil Procedure 12(b) applicable to this proceeding, dismissal is proper when the plaintiff's complaint fails to state a claim upon which relief can

be granted. FED. R. BANKR. P. 7012(b); FED. R. CIV. P. 12(b)(6). When reviewing a complaint for purposes of adjudicating a motion to dismiss for failure to state a claim, the Court must accept as true all of the factual allegations contained in the complaint and, on the basis of those facts, determine whether the plaintiff is entitled to relief. *See Bell Atlantic Corp. v. Twombly*, --- U.S. ----, 127 S. Ct. 1955 (2007); *Daewoo Motor America, Inc. v. General Motors Corp.*, 459 F.3d 1249 (11th Cir. 2006) (court must “view the complaint in the light most favorable to the plaintiff and accept the well-pleaded facts as true”). The facts asserted in the complaint need only comprise a “short and plain statement” that shows that the plaintiff has a claim to relief that is “plausible on its face.” *See* FED. R. BANKR. P. 7008; Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *see also Schaaf v. Residential Funding Corp.*, 517 F.3d 544 (8th Cir. 2008) (“The plaintiffs need not provide specific facts in support of their allegations, *Erickson v. Pardus*, --- U.S. ----, 127 S. Ct. 2197 (2007) (per curiam), but they must include sufficient factual information to provide the ‘grounds’ on which the claim rests, and to raise a right to relief above a speculative level. *Twombly*, 127 S.Ct. at 1964-65 & n. 3.”). That being said, the Court need not accept as true “threadbare recitals of a cause of action’s elements, supported by mere conclusory statements.” *Ashcroft v. Iqbal*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 1937 (2009). The complaint has “facial plausibility” only when well-

pleaded facts permit the Court to "draw a reasonable inference that" the plaintiff can meet the required elements of the cause of action. *Ashcroft v. Iqbal*, \_\_ U.S. \_\_, 129 S. Ct. 1937, 1940 (2009).

“The relevant record under consideration consists of the complaint and any ‘document integral or explicitly relied on in the complaint.’” *In re New Century Holdings, Inc.*, 387 B.R. 95 (Bankr. D. Del. 2008) (quoting *U.S. Express Lines, Ltd. v. Higgins*, 281 F.3d 383, 388 (3d Cir.2002); *see also In re Raymond Professional Group, Inc.*, 386 B.R.678 (Bankr. N.D. Ill. 2008) (“A court may consider only the contents of the pleadings,” which include “the complaint, the answer, and any written instruments attached as exhibits,’ . . ., including documents incorporated by reference in the pleadings.”).

To determine whether the complaint should be dismissed for failure to state a claim, the Court must assume the truth of the facts stated in the complaint and determine whether, under those facts, the Plaintiffs can prove that the debts at issue are excepted from discharge. In this case, the Plaintiffs' complaint fails to even allege facts that would be sufficient to support a finding of nondischargeability under section 523 of the Bankruptcy Code. From the allegations made, the Court can find only that, prior to filing his bankruptcy petition, the Defendant incurred a debt in connection with the purchase of a business. Under section 523, all debts are

dischargeable unless specifically excepted by the statute. The three most commonly pled exceptions to discharge are sections 523(a)(2), (a)(4), and (a)(6). The Court, however, finds no facts that would render this debt nondischargeable under any subsection of section 523.

For example, section 523(a)(2) requires a creditor to prove that: (1) the debtor made a false representation with the purpose and intention of deceiving the creditor; (2) the creditor relied upon the debtor's representation; (3) such reliance by the creditor was justified; (4) the creditor suffered a loss as a result of that reliance. *See Moore v. Gill (In re Gill)*, 181 B.R. 666, 673 (Bankr. N.D. Ga. 1995). The instant complaint alleges no facts that would support a finding that the Defendant intentionally made a false representation to the Plaintiff.

Similarly, section 523(a)(4) requires the creditor to establish that its debt was incurred as a result of the Defendant's commission of an act of defalcation while acting in a fiduciary capacity, embezzlement, or larceny. *See* 11 U.S.C. § 523(a)(4). The complaint fails to allege any facts upon which the Court could make a finding that the Defendant embezzled or stole the Plaintiffs' funds, and there is no allegation that the Defendant acted in a fiduciary capacity, *vis a vis* the Plaintiff.

Finally, section 523(a)(6) requires a creditor to prove that the debt arose from a willful and malicious injury caused by the debtor. 11 U.S.C. § 523(a)(6). Such an

injury can include a willful and malicious injury to a person's property. *In re Pharr-Luke*, 259 B.R. 426 (Bankr. S.D. Ga. 2000); *In re LaGrone*, 230 B.R. 900 (Bankr. S.D. Ga.1999). However, "the term 'willful' means intentional and deliberate and cannot be established merely by applying a recklessness standard, and 'malicious' means wrongful and without just cause . . . even in the absence of personal hatred, spite, or ill will." *Blashke v. Standard (In re Standard*, 123 B.R. 444, 449 (Bankr. N.D. Ga. 1991) (Bihary, J.) (citations omitted). Additionally, the United States Supreme Court has held that "nondischargeability takes a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury." *Kawaauhau v. Geiger*, 523 U.S. 57 (1998). Here, the Plaintiffs' complaint fails to allege facts that would support a finding that the Defendant acted with the intent to cause an injury to the Plaintiffs.

Because the complaint fails to allege sufficient facts to support a finding that the debt owed by the Defendant to the Plaintiffs is nondischargeable under section 523, the Court finds that the Defendant's motion should be, and hereby is, **GRANTED**. The Plaintiffs' complaint is **DISMISSED**.

**END OF DOCUMENT**